UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MIGUEL GARCIA, ALBERTO OLVERA GOMEZ, JOSE BOTELLA AVILA, GERALD PRINCILUS, and FARM LABOR ORGANIZING COMMITTEE, Plaintiffs, v. EUGENE SCALIA, in his official capacity as Secretary of Labor, and U.S. DEPARTMENT OF LABOR, Defendants.	)	Civil Action No. 18-1968(RDM)

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND MOTION FOR JUDGMENT ON THE PLEADINGS AND REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In 2010, the Department of Labor (DOL) issued a rule that changed how the agency would comply with its obligations under the Immigration and Nationality Act (INA) to ensure that the H-2A program does not adversely affect the wages of U.S. workers. In so doing, DOL determined that workers' wages would be depressed if DOL granted temporary employment certifications to employers who did not offer the highest of four wages: (1) the Adverse Effect Wage Rate (AEWR), as calculated by DOL; (2) "the prevailing hourly wage or piece rate"; (3) "the agreed-upon collective bargaining wage"; or (4) "the Federal or State minimum wage." DOL, Final Rule, Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. 6884, 6891–6901 (Feb. 12, 2010) (2010 Rule); 20 C.F.R. § 655.120(a). At the same time, DOL changed the definitional provisions of the regulations and eliminated all references to prevailing wage surveys conducted by state workforce agencies (SWAs) that appeared in prior versions of the rule.

Despite DOL's findings as to the need to ensure that H-2A employers pay the highest of these four wage rates, DOL adopted a policy and practice of ignoring "the prevailing hourly wage or piece rate" whenever SWAs do not conduct surveys pursuant to a 1981 guidance document, known as Handbook 385. As a result, DOL ignores the prevailing hourly wage in the vast majority of instances. Plaintiffs, a union that represents thousands of H-2A workers and four individual agricultural workers who compete with H-2A workers, are directly harmed by DOL's policy and practice, and are substantially likely to continue to be harmed.

DOL argues that the specific policy and practice at issue here is not a final agency action amenable to judicial review under the Administrative Procedure Act (APA). Without explicitly saying so, DOL suggests that *no* unwritten policy or practice could constitute final agency action under the APA. But the D.C. Circuit has held otherwise. *See, e.g.*, *Meina Xie v. Kerry*, 780 F.3d

405, 407–08 (D.C. Cir. 2015); *Venetian Casino Resort, LLC v. EEOC*, 530 F.3d 925, 931 (D.C. Cir. 2008). And DOL's argument that the challenged policy and practice has no "legal consequences" ignores that DOL staff has no discretion to depart from the policy when evaluating labor certification applications, that a grant of a labor certification is requisite to hiring H-2A workers, and that employers are obligated to pay only the wages approved by DOL. DOL's overreliance on the line of cases prohibiting actions seeking "wholesale improvement" of government programs fares no better. Plaintiffs have identified a specific, undisputed practice that violates a specific regulatory provision.

DOL also argues that any claim for violating regulations promulgated in 2010 accrued at the time those regulations were promulgated. As the D.C. Circuit stated just last year, however, in another case involving a DOL policy and practice of violating the H-2A regulations, a challenge to "[a]n agency's unannounced departure in practice from a written regulation" does not accrue at the time that regulation was promulgated. *Hispanic Affairs Project v. Acosta*, 901 F.3d 378, 387 (D.C. Cir. 2018).

On the merits, DOL seeks "deference" without identifying any language in the current regulations that endorses this practice and without pointing to any items in the administrative record that demonstrate reasoned analysis as to the propriety of this practice. DOL's argument boils down to an assertion that it cannot possibly be violating a 2010 regulation (which did *not* mention SWA surveys) because it is merely doing what it did for decades earlier (when the operative regulations *did* mention SWA surveys). But both factual circumstances and the *law* have changed. Even if the regulatory provisions are ambiguous, canons of regulatory interpretation do not allow significant, relevant regulatory changes—which DOL misrepresents in its memorandum—to be ignored. DOL's praise of "cooperative federalism" cannot make DOL's

policy choices reasonable when DOL has failed to consider the impacts of those policies: Its interpretation of the regulation causes DOL to ignore the prevailing wage for the vast majority of labor certifications, a result inconsistent with the agency's prior statements as to the importance and function of the prevailing wage requirement, and with its prior statements about what the INA requires. Definitionally, the choice to adopt an exclusive method of interpreting the prevailing wage that results in the prevailing wage requirement dropping out in its entirety in forty of fifty-three states and territories (and in many jobs in the remaining states and territories) is arbitrary and capricious.

Finally, by taking the prevailing wage into account only in instances where a SWA has completed a wage survey, DOL has effectively amended a legislative rule without undertaking notice-and-comment rulemaking. DOL errs in claiming that notice-and-comment rulemaking was not required because the change is merely procedural. The limitation on the circumstances in which H-2A employers must pay the prevailing wage is a substantive change to a legislative rule, and is thus indistinguishable from the H-2A guidance found to have violated notice-and-comment requirements in *Mendoza v. Perez*, 754 F.3d 1002, 1024 (D.C. Cir. 2014). For all these reasons, DOL's cross-motion for summary judgment and motion for judgment on the pleadings should be denied, and Plaintiffs' motion for summary judgment should be granted.

LEGAL STANDARD

A motion for judgment on the pleadings is "functionally equivalent to a Rule 12(b)(6) motion." *Rollins v. Wackenhut Servs., Inc.*, 703 F.3d 122, 130 (D.C. Cir. 2012). In considering such a motion, the Court should thus "'accept as true the allegations in the opponent's pleadings' and 'accord the benefit of all reasonable inferences to the non-moving party.'" *Stewart v. Evans*, 275 F.3d 1126, 1132 (D.C. Cir. 2002) (quoting *Haynesworth v. Miller*, 820 F.2d 1245, 1249 n.11

(D.C. Cir. 1987)). The motion should only be granted "when 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Statewide Bonding, Inc. v. U.S. Dep't of Homeland Sec.*, Civ. Action No. 18-2115(JEB), 2019 WL 5579970 (D.D.C. Oct. 29, 2019) (quoting *Lindsey v. Dist. of Columbia*, 609 F. Supp. 2d 71, 77 (D.D.C. 2009)).

A summary judgment motion, on the other hand, "serves as a mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and is otherwise consistent with the APA standard of review." *Charter Operators of Alaska v. Blank*, 844 F. Supp. 2d 122, 127 (D.D.C. 2012) (citing *Richards v. INS*, 554 F.2d 1173, 1177 & n. 28 (D.C. Cir. 1977)). As relevant here, the Court must therefore determine whether the agency's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or was taken "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D).

ARGUMENT

I. Plaintiffs Have Standing to Challenge DOL's Ongoing Policy and Practice.

DOL contends that Plaintiffs lack standing because their injuries are speculative and moot. Both contentions are wrong.

Plaintiffs in this action include both FLOC, an associational plaintiff, and four individual U.S. agricultural workers. While only one plaintiff needs to have standing for this Court to have jurisdiction, *Americans for Safe Access v. DEA*, 706 F.3d 438, 443 (D.C. Cir. 2013), each of the plaintiffs here do. Both FLOC, via its members, and the Individual Plaintiffs have been injured by, and have the requisite substantial risk of future injury from, DOL's policy and practice of ignoring the prevailing wage requirement absent a Handbook-compliant SWA survey. FLOC members who work in agricultural jobs as part of the H-2A program are paid less than they would be if DOL

were to comply with its legal obligation. The Individual Plaintiffs, on the other hand, suffer a competitive injury, as DOL's approval of unlawfully low wages drives wages down across the market and denies the Individual Plaintiffs the opportunity to compete for agricultural jobs at the higher wages. As explained in detail below, the parties' past conduct and their stated intentions together demonstrate a "substantial probability" that these financial and competitive injuries will continue to materialize for the foreseeable future. *See Sierra Club v. Jewell*, 764 F.3d 1, 7 (D.C. Cir. 2014). Plaintiffs will continue working in occupations and industries that rely heavily on H-2A workers, and DOL will continue certifying clearance orders from dozens of states without considering the prevailing wage rate.

The failure to consider whether an offered wage meets or exceeds the prevailing wage is undoubtedly connected to the resulting approved wage. By the same token, the fact that "the OES [Occupational Employment Statistics Survey Prevailing Wage] is *not* always higher than the AEWR" and "existing prevailing wage rates based on SWA surveys are *not* always higher than the AEWR," Dkt. 34-1 at 27 (Defs. Mem. at 18), does not render Plaintiffs' injuries speculative. DOL does not dispute that there *are* scenarios in which the prevailing wage exceeds the AEWR, and Plaintiffs "need not demonstrate that [they are] injured by each and every agency action which flows from the implementation of the unlawful Program." *Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 314 (D.C. Cir. 1987). The AEWR and the prevailing wage rate are interlocking protections that guard against different problems: The prevailing wage protects U.S. workers' wages in *high-wage areas* where "the local shortage of labor" historically drove up wages. 2010 Rule, 75 Fed. Reg. at 6893. The AEWR protects U.S. workers in *low-wage areas* by "approximat[ing] the equilibrium wage that would result" over a large geographic area "absent an influx of temporary foreign workers." *Id.* at 6891. By functionally eliminating one of the two

interlocking protections, DOL permits the undercutting of wages in high-wage areas; given DOL's prior acknowledgment that failing to enforce the prevailing wage requirement will "disadvantage[]" "incumbent domestic workers" in those high-wage scenarios, *id.* at 6893, there is a substantial likelihood that at least one Plaintiff will be harmed.

Moreover, because Plaintiffs' claims are essentially procedural—that DOL regularly fails to consider whether the offered wage meets or exceeds the prevailing wage before granting a certification—Plaintiffs "need not demonstrate that correcting the procedural violation itself would necessarily remedy" their injury, just that "'there is some possibility' that it would do so." *Nucor Steel-Ark. v. Pruitt*, 246 F. Supp. 3d 288, 301 (D.D.C. 2017) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007)); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992) ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."). "All that is necessary is to show that the procedural step was connected to the substantive result." *Sugar Cane Growers Co-Op. of Fla. v. Veneman*, 289 F.3d 89, 94–95 (D.C. Cir. 2002).

DOL also suggests that Plaintiffs lack standing because their injuries result from inaction by SWAs, rather than DOL. Dkt. 34-1 at 27 (Defs. Mem. at 18). That DOL has ignored *its* responsibility under 20 C.F.R. § 655.161(a), however, and instead relied solely on state agencies not even mentioned in the relevant regulations does not make Plaintiffs' injury "speculative." DOL's grant of certifications without considering whether the offered wage meets the prevailing wage represents a choice made by DOL, not an "unfettered choice" made by states, as DOL claims. Dkt. 34-1 at 27 (Defs. Mem. at 18) (quoting *Defs. of Wildlife*, 504 U.S. at 562).[1]

[1] If it is truly states' "unfettered choice" whether to conduct prevailing wage surveys, it is so because DOL has allowed it. DOL could refuse to grant certifications where SWAs do not conduct wage surveys, just as it refuses to grant certifications where SWAs do not conduct housing

A. FLOC has standing to sue based on the ongoing harms to its members.

As an associational plaintiff, FLOC has standing if "(1) at least one of its members would have standing to sue in his own right, (2) the interest it seeks to protect is germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the member to participate in the lawsuit." *Am. Fuel & Petrochemical Mfrs. v. EPA*, 937 F.3d 559, 591–92 (D.C. Cir. 2019) (quoting *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 182 (D.C. Cir. 2017)).

DOL makes no argument about the latter two elements, both of which are readily satisfied. As a labor union, FLOC's goal is "to improve working conditions for farmworkers." Dkt. 10-3 at 1 (Velasquez Decl. ¶ 2). FLOC "routinely advocate[s] with employers on behalf of [its] members on wage-related issues," Flores Decl. ¶ 4, and so easily surmounts the "undemanding" germaneness requirement of "mere pertinence." *NAACP v. Trump*, 298 F. Supp. 3d 209, 226 (D.D.C. 2018) (quoting *Humane Soc'y of the U.S. v. Hodel*, 840 F.2d 45, 58 (D.C. Cir. 1988)). Testimony from individual workers is unnecessary to resolve the "purely legal" question of whether DOL's actions were arbitrary and capricious or contrary to law. *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1282 (D.C. Cir. 2005); *see also Garcia v. Acosta*, 393 F. Supp. 3d 93, 105–06 (D.D.C. 2019) (discussing fitness for adjudication).

Many FLOC members face a substantial risk of future injury as a result of the challenged policy and practice: If DOL considered the prevailing wage in all circumstances, there is a substantial likelihood that, in certain industries and localities, the resulting H-2A wages would be

inspections. *See* DOL, OFLC Frequently Asked Questions and Answers, H-2A Pre-Filing No. 15 (Feb. 13, 2013), https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm ("[T]he Department cannot grant a temporary labor certification without proof [that housing complies with program requirements], which is typically provided in the form of a confirmation from the SWA that the employer-provided housing has sufficient capacity and is in compliance with applicable requirements.").

higher. FLOC's President explained in his initial declaration that "[i]n every season, FLOC members are … working in jobs approved by DOL, without consideration of the prevailing wage for that job." Dkt. 10-3 at 2 (Velasquez Decl. ¶ 6). As one example, hundreds of FLOC members work and will continue to work as H-2A farmworkers and laborers in and around Moore County, North Carolina. Flores Decl. ¶ 8. Because there is no SWA-conducted survey for most of their work, DOL has approved a wage of $12.25 per hour, the AEWR. *See* AR2420–21; Flores Decl. ¶¶ 5, 8. Under one measure, the OES survey, the prevailing wage to which those FLOC members would be entitled is $12.96 per hour—meaning FLOC members are being underpaid by $0.71 per hour.[2] *See* Supp. Pulver Decl., Ex. 16. Had DOL considered the prevailing wage rate, there is thus "some possibility" that these hundreds of FLOC members would have received higher wages. *See Nucor Steel-Ark.*, 246 F. Supp. 3d at 301 (quoting *Massachusetts v. EPA*, 549 U.S. at 518). Receipt of "unlawfully low wages" is an injury that confers standing. *See Hispanic Affairs Project*, 901 F.3d at 396.

"[T]his is not a situation in which plaintiffs have asserted mere 'some day' intentions to engage in the conduct they claim will cause them injury." *In re Navy Chaplaincy*, 697 F.3d 1171,

[2] DOL's argument that "following notice-and-comment rulemaking in 2009–2010, the OES survey is not currently how DOL calculates the prevailing wage in the H-2A program," Dkt. 34-1 at 27 (Defs. Mem. at 18), is not relevant to the standing analysis. The 2010 Rule does not specify how the prevailing wage is to be calculated. 2010 Rule, 75 Fed. Reg. at 6887. But DOL acknowledged in 2008 and again in 2019 that the OES is a valid measure of the agricultural prevailing wage. DOL, Proposed Rule, Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 84 Fed. Reg. 36168, 36180 (July 26, 2019) (2019 NPRM); DOL, Final Rule, Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement, 73 Fed. Reg. 77110, 77167 (Dec. 18, 2008) (2008 Rule). The prevailing wage as identified by the "reliable and comprehensive" OES survey, 84 Fed. Reg. at 36180, is evidence that DOL's failure to consider the prevailing wage "created a demonstrable risk of injury to the particularized interest" of FLOC's members. *County of Delaware, Pa. v. Dep't of Transp.*, 554 F.3d 143, 148 (D.C. Cir. 2009) (quoting *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 669 (D.C. Cir. 1996)).

1176 (D.C. Cir. 2012) (quoting *Defs. of Wildlife*, 504 U.S. at 564). Going forward, FLOC members will continue working in H-2A jobs in these high-wage parts of North Carolina, and FLOC will continue representing and advocating for them. Flores Decl. ¶ 9. And given that North Carolina's SWA has conducted no more than a handful of Handbook-compliant prevailing wage surveys over the past several years, there is a "substantial likelihood" that DOL will continue to certify jobs for FLOC members without considering the prevailing wage. *See, e.g.*, AR2356–66, 2420–21. In addition, "[t]he prospect of future injury becomes significantly less speculative where, as here, plaintiffs have identified concrete and consistently-implemented policies claimed to produce such injury." *In re Navy Chaplaincy*, 697 F.3d at 1176–77.

B. The Individual Plaintiffs have standing based on ongoing injury.

The Individual Plaintiffs are injured in a different fashion: by "increased competition [and] lost opportunity." *Mendoza*, 754 F.3d at 1010. As the D.C. Circuit has recognized, "when [a policy] illegally structure[s] a competitive environment … parties defending concrete interests in that environment suffer legal harm under Article III." *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287, --- F.3d ---, 2019 WL 5849503, at *3 (D.C. Cir. Nov. 8, 2019) (quoting *Am. Inst. of Cert. Public Accountants v. IRS*, 804 F.3d 1193, 1197 (D.C. Cir. 2015) (*AICPA*)). By allowing employers to hire H-2A labor at lower wage rates, DOL's policy and practice depresses wages for U.S. workers competing for the same jobs.

In *Mendoza*, the D.C. Circuit discussed at length how such competitive harms provide standing. In that case, U.S. workers challenged DOL guidance that "impose[d] different minimum wage requirements and provide[d] lower standards for employer-provided housing" for open-range herders in the H-2A program as compared to other H-2A workers. 754 F.3d at 1009. The court explained that U.S. workers have standing to challenge "rules that lead to an increased supply

of labor—and thus competition—in th[eir labor] market." *Id.* at 1011. In *Mendoza*, the challenged DOL guidance allowed H-2A herders to be paid less than the AEWR and allowed employers to provide lesser-quality housing than would otherwise be required. The D.C. Circuit concluded that this guidance adversely affected *non*-H-2A "herders by lowering wages and worsening working conditions." *Id.* at 1012. Thus, plaintiffs who "averred they [were] experienced and qualified herders," even those who had not worked as herders or even applied to do so for years, had standing to challenge the DOL guidance. *Id.* at 1014. And since *Mendoza*, the D.C. Circuit has found standing based on similar competitive harms without requiring "'evidence that the competitive harm' [plaintiffs] claim[] from the rule 'has yet occurred.'" *Save Jobs USA*, 2019 WL 5849503, at *3 (quoting *AICPA*, 804 F.3d at 1198); *see also Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 892 F.3d 332, 340 (D.C. Cir. 2018).

Here, Plaintiffs have shown that DOL's practice of ignoring the prevailing wage requirement regularly results in wages well below the prevailing wage as calculated by at least one measure, the OES survey. Dkt. 31 at 21 (Pls. Mem. at 12 (summarizing exhibits)). These lowered wages have the same impact as the lowered wages in *Mendoza* and adversely affect U.S. farmworkers like the Individual Plaintiffs. Each is a member of the relevant labor market, "currently employed on a full- or part-time basis in [farming] positions" and engaging in regular job searches. *Wash. All. of Tech. Workers*, 892 F.3d at 340. *See* Dkt. 10-4 at 1 (Garcia Decl. ¶¶ 3, 5) ("Since 1990, I have been a farmworker in the U.S. … Each season, I apply for jobs by calling contractors that I have worked with."); Dkt. 11-1 at 1–2 (Botello Avila Decl. ¶¶ 3, 5) ("Since at least 1986, I have worked in the United States as a farmworker. … Each season, I look for agricultural work by contacting farm labor contractors, harvesting companies and growers to inquire about available jobs."); Dkt. 11-2 at 1–2 (Olvera Gomez Decl. ¶¶ 2, 5) ("I earn my living

as a farmworker. … I locate farm labor jobs by checking with farm labor contractors, harvesting companies and growers to see if they're hiring."); Dkt. 11-3 at 1–2 (Princilus Decl. ¶¶ 2, 5) ("I earn my living as a farmworker. … I find most of my jobs through crewleaders who recruit workers for farms or harvesting companies. I contact crewleaders and ask them if [there are] jobs available with their crews"); *see also* Olvera Gomez Suppl. Decl. ¶¶ 3–4 ("My intention is to continue working as a farm laborer as long as I am able to do so. … I am presently working picking lemons near Yuma, Arizona."); Botello Avila Suppl. Decl. ¶¶ 3, 6 ("I plan to continue working in farm labor as long as I am able to do so. … I am presently working picking lemons again in Arizona."); Princilus Suppl. Decl. ¶¶ 3, 8 ("I expect to continue working in farm labor jobs as long as I am able to do so. … Each season, I apply for jobs by contacting farm labor contractors. … I expect to find my future farm labor jobs in the same way."); Garcia Suppl. Decl. ¶¶ 7–8 ("I want to continue working as a farmworker for as long as I am able. … Each season, I apply for jobs by calling contractors. … I plan to continue looking for jobs this way each year in the future.").

In addition to suffering from lower wages across their industry, the Individual Plaintiffs also lose opportunities because of DOL's policy. *See Mendoza*, 754 F.3d at 1010. They are deemed "unavailable" for H-2A work if they "are unwilling—or unable—to come unless they receive more" than is being offered in the H-2A contract. *Hernandez Flecha v. Quiros*, 567 F.2d 1154, 1156 (1st Cir. 1977). The Individual Plaintiffs have stated that they are frequently not willing to work at the low wages DOL permits, although they would be willing to work at higher wages. Dkt. 10-4 at 2–3 (Garcia Decl. ¶¶ 9–10); Dkt. 11-1 at 2 (Botello Avila Decl. ¶ 8); Dkt. 11-2 at 2–3 (Olvera Gomez Decl. ¶¶ 8–9); Dkt. 11-3 at 2–3 (Princilus Decl. ¶¶ 8–9); Botello Avila Suppl. Decl. ¶ 11; Olvera Gomez Suppl. Decl. ¶ 8; Princilus Suppl. Decl. ¶ 9; Garcia Suppl. Decl. ¶ 10. They are thus injured by losing the opportunity to apply for those positions.

As with the injury to FLOC members, the injury to the Individual Plaintiffs is not speculative. Plaintiffs are not required, as DOL suggests, to predict where and when they will work in the future. Dkt. 34-1 at 26 (Defs. Mem. at 17). *See In re Navy Chaplaincy*, 697 F.3d at 1178 ("[A]bsolute certainty is not required.") (quoting *NB ex rel. Peacock v. Dist. of Columbia*, 682 F.3d 77, 85–86 (D.C. Cir. 2012)). Farm labor is by nature migratory and transient, *see* 20 C.F.R. § 655.103(d), and no farmworker can predict with certainty where he will work from one year to the next. But the Individual Plaintiffs have worked in agriculture for years (in most cases, decades). Dkt. 10-4 at 1 (Garcia Decl. ¶ 3) (more than 25 years); Dkt. 11-1 at 1 (Botello Avila Decl. ¶ 3 (more than 30 years); Dkt. 11-2 at 1 (Olvera Gomez Decl. ¶ 3) (decades); Dkt. 11-3 at 2 (Princilus Decl. ¶ 3) (many years). And the Individual Plaintiffs intend to continue working in the same states where they have labored for years, states like Arizona, California, and Florida. Olvera Gomez Suppl. Decl. ¶ 3 (Arizona); Botello Avila Suppl. Decl. ¶¶ 3, 5 (Arizona, California); Princilus Suppl. Decl. ¶ 4 (Florida). Each of those states routinely fails to conduct prevailing wage determinations, despite containing areas in each where the OES prevailing wage exceeds the AEWR. AR2379 (reflecting a SWA prevailing wage finding for only one job/locality in Arizona in 2018–19); AR2381 (reflecting no SWA prevailing wage findings in California in 2018); AR2386 (reflecting no SWA prevailing wage finding for Florida in 2018–19); *compare* Pulver Supp. Decl. ¶¶ 2-4, Exs. 17, 18, and 19 (2019 OES prevailing wages of $15.56, $16.68, and $14.71 respectively, for farmworkers in sample areas of Arizona, California, and Florida), *with* DOL, Notice, 2019 Adverse Effect Wage Rates for Non-Range Occupations, 83 Fed. Reg. 66306, 66306 (Dec. 26, 2018) (2019 AEWRs of $12.00, $13.92, and $11.24, respectively, in Arizona, California, and Florida). It is thus not "unadorned speculation" to assert that at least one of the Individual Plaintiffs, if not all of them, will continue to work in such employment in the future. *See Save Jobs*

USA, 2019 WL 5849503, at *4 (finding standing because "H-1B visa holders have competed with Save Jobs' members in the past, and, as far as we know, nothing prevents them from doing so in the future").

C. Plaintiffs' claims are not moot.

DOL argues that Plaintiffs' claims are moot because the Individual Plaintiffs' earlier declarations refer to job certifications that have since expired. But those same declarations establish that the Individual Plaintiffs were and remain competitors in the agricultural labor market. *See* Dkt. 10-4 at 1 (Garcia Decl. ¶¶ 3–5); Dkt. 11-1 at 1–2 (Botello Avila Decl. ¶¶ 3–5); Dkt. 11-2 at 1–2 (Olvera Gomez Decl. ¶¶ 2–5); Dkt. 11-3 at 1–2 (Princilus Decl. ¶¶ 2–5). They also confirmed that FLOC members "are being paid a wage lower than that required by the Offered Wage Rate provision." Dkt. 10-3 at 2 (Velasquez Decl. ¶ 4). Each Individual Plaintiff will continue seeking employment as a farmworker for as long as he is able. Olvera Gomez Suppl. Decl. ¶ 3; Botello Avila Suppl. Decl. ¶ 3; Princilus Suppl. Decl. ¶ 3; Garcia Suppl. Decl. ¶ 7. FLOC has thousands of dues-paying H-2A members whom it will continue to represent in the future, hundreds of whom are regularly paid less than the local prevailing wage. Flores Decl. ¶¶ 6, 8–9.

Given the evidence that DOL continues to certify jobs at rates below at least one measure of the prevailing wage, *see* Dkt. 31 at 12 (Pls. Mem. at 12) (chart identifying continuing practice), the Individual Plaintiffs' articulated intentions to continue in farm labor and FLOC's attestations that its membership includes and will continue to include many H-2A workers in jobs where DOL has failed to consider the prevailing wage provide sufficient evidence of ongoing harm. *Compare Save Jobs USA*, 2019 WL 5849503, at *4 ("By contrast, in this case we know that H-1B visa holders have competed with Save Jobs' members in the past, and, as far as we know, nothing prevents them from doing so in the future."); *Mendoza*, 754 F.3d at 1013 ("Even though the

plaintiffs have not worked as herders since 2011 and may not have applied for specific herder jobs since that time, they have affirmed their desire to work as herders and stated their intention to do so if wages and working conditions improve.").

II. DOL's Policy and Practice is a Final Agency Action.

Plaintiffs challenge DOL's policy and practice of ignoring the prevailing wage requirement absent findings from a Handbook-compliant SWA wage survey. DOL does not dispute that this policy and practice exists or that DOL staff do not have discretion to depart from it when reviewing individual applications. Nonetheless, DOL argues that the policy and practice does not constitute reviewable final agency action. Further, DOL suggests that *no* unwritten policy and practice can be challenged on its face, claiming that Plaintiffs' claim fails under both the two-prong test set forth in *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997), and the prohibition on programmatic relief contained in *Lujan v. National Wildlife Federation*, 497 U.S. 871, 893 (1990). Neither argument is consistent with current case law. Courts, including the D.C. Circuit, have regularly allowed plaintiffs to litigate APA challenges to unwritten policies and practices, apart from applications of those policies and practices, rejecting the same arguments made here. *See, e.g.*, *Meina Xie*, 780 F.3d at 407–08; *Venetian Casino Resort*, 530 F.3d at 931; *Al Otro Lado, Inc. v. McAleenan*, 394 F. Supp. 3d 1168, 1206–07 (S.D. Cal. 2019); *Cancino Castellar v. McAleenan*, 388 F. Supp. 3d 1218, 1247 (S.D. Cal. 2019); *Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110, 138–39 (D.D.C. 2018); *Ramirez v. U.S. Immigration & Customs Enf't*, 310 F. Supp. 3d 7, 21 & n.4 (D.D.C. 2018); *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 184–85 (D.D.C. 2015). "Denying review of agency action that is essentially conceded but ostensibly unwritten would fly in the face of the Supreme Court's instruction that finality be interpreted 'pragmatically.'" *R.I.L-R*, 80 F. Supp. 3d at 184 (internal marks omitted (quoting *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 239 (1980)).

A. DOL's policy and practice satisfies *Bennett*.

As explained in Plaintiffs' opening brief, Dkt. 31 at 24–28 (Pls. Mem. at 15–19), DOL's policy and practice meets both prongs of the *Bennett* analysis. There is nothing tentative or interlocutory about Defendants' policy and practice of not considering the prevailing wage absent a SWA survey, and that policy and practice impacts both Plaintiffs' legal rights under the INA and employers' corresponding legal obligations.

DOL does not directly address Plaintiffs' analysis of those two prongs or any of the numerous cases cited by Plaintiffs. Rather, DOL's application of *Bennett* to *this* case consists entirely of a single sentence comparing the challenged practice to the non-binding "policy guidelines" at issue in *Center for Auto Safety v. NHTSA*, 452 F.3d 798 (D.C. Cir. 2006), and stating that the policy and practice at issue here "may have 'practical' consequences, but these practical effects are insufficient to demonstrate that there are any 'legal' consequences." Dkt. 34-1 at 33 (Defs. Mem. at 24).[3] DOL does not explain why that is so, and Plaintiffs have explained why it is not.

Bennett is clear that a final agency action is "one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" 520 U.S. at 178 (quoting *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatl.*, 400 U.S. 62, 71 (1970)). Both are present here. The H-2A certification process is how DOL determines whether an employer may hire H-2A workers and what wage they must be paid. When DOL determines a wage is adequate

[3] As part of a broader discussion of the concept of finality, DOL argues that *Center for Auto Safety* stands for the proposition that the "finality" and "legislative rule" inquiries "necessarily overlap." Dkt. 34-1 at 32 (Defs. Mem. at 23). As noted in Plaintiffs' opening memorandum, the D.C. Circuit has explained that "the test for finality is independent of the analysis for whether an agency action is a legislative rule rather than an interpretive rule." *Cal. Cmtys. Against Toxics v. EPA*, 934 F.3d 627, 635 (D.C. Cir. 2019) (quoted in Dkt. 31 at 25 (Pls. Mem. at 16 n. 13)).

without determining whether it meets or exceeds the prevailing wage, that determination has the legal effect of allowing an employer to hire and pay H-2A workers at that wage.

As one court in this district recently explained, "the appropriate point of reference when evaluating whether an agency has engaged in a final agency action is *the agency's conduct*." *Make the Rd. N.Y. v. McAleenan*, No. 19-CV-2369 (KBJ), 2019 WL 4738070, at *30 (D.D.C. Sept. 27, 2019). And in this regard, the policy and practice at issue fundamentally differs from the guidelines at issue in *Center for Auto Safety*. There, the court found that what the plaintiff was challenging was merely an agency's views on the legality of third-party automotive manufacturer behavior. 452 F.3d at 808. Here, the policy and practice challenged is *the agency's* own behavior in making legally binding determinations. The action here is thus closer to that at issue in *Venetian Casino Resort*, where the D.C. Circuit found that an EEOC informal policy of allowing disclosure of confidential information without notice was final agency action under *Bennett*. 530 F.3d at 931.

DOL does not assert that DOL staff has any discretion *not* to act consistent with the challenged policy and practice by, for example, considering a non-SWA prevailing wage source in evaluating a labor certification application. And DOL does not dispute that the agency has engaged in, and continues to engage in, the challenged policy and practice. Plaintiffs' claim is thus similar to those in many cases where courts have found agencies' unwritten policies of either considering improper factors, or failing to consider required factors, in their evaluations of matters before them to be final and actionable. *See, e.g.*, *Aracely, R.*, 319 F. Supp. 3d at 139 (finding unwritten policy and practice of considering inappropriate factors in making parole determinations final agency action); *Ramirez*, 310 F. Supp. 3d at 22 (unwritten policy and practice of failing to

consider specified statutory factors in making placement decisions meets the requirements of *Bennett*).

B. Plaintiffs' challenge to a discrete agency policy and practice is not an impermissible programmatic attack.

DOL argues that Plaintiffs have not alleged a "discrete" agency action, but instead have made a "broad programmatic attack." DOL does not explain, though, what makes the action here—a challenge to a specific policy and practice—"broad" or "programmatic," or how this case is meaningfully distinguishable in this regard from any of the other cases where courts have found challenges to unwritten policies and practices sufficiently discrete.

First, DOL states that "[t]here are no discrete actions left in this case because the Court dismissed those individual claims as moot." Dkt. 34-1 at 34 (Defs. Mem. at 25). But there is no reason why this would be so. The mootness of specific challenges has no relationship to whether a policy and practice is an independently challengeable final agency action. Indeed, as this Court noted in denying DOL's motion to dismiss the policy and practice claims, the D.C. Circuit has expressly endorsed the viability of a policy and practice claim even if the challenges to specific applications are moot. *Garcia*, 393 F. Supp. 3d at 104 (quoting *City of Houston v. Dep't of Hous. & Urban Dev.*, 24 F.3d 1421, 1428 (D.C. Cir. 1994)). And as discussed above, Plaintiffs have established a substantial likelihood that they will be subject to the challenged policy and practice moving forward.

Second, Defendants discuss a number of cases that concern the inability to seek "wholesale correction" of the administration of a program through the APA, beginning with *National Wildlife Federation*, 497 U.S. at 893. Plaintiffs seek no such "wholesale" or "programmatic" relief; rather, they "seek to compel an agency to take the discrete and concrete action of considering [regulatorily] specified factors in determining" whether to grant foreign labor certifications.

Ramirez, 310 F. Supp. 3d at 21; *see also R.I.L-R*, 80 F. Supp. 3d at 184 (rejecting similar arguments and noting "Plaintiffs here attack particularized agency action—namely, ICE's consideration of an allegedly impermissible factor in making custody determinations").

Plaintiffs' challenge is thus not comparable to the collection of agency actions and inactions that the plaintiffs in *National Wildlife Federation* sought to challenge as a single "final agency action"—combining into one claim the "failure to revise land use plans in proper fashion, failure to submit certain recommendations to Congress, failure to consider multiple use, inordinate focus upon mineral exploitation, failure to provide required public notice, [and] failure to provide adequate environmental impact statements." 497 U.S. at 891. *Cf. Sierra Club v. Peterson*, 228 F.3d 559, 566 (5th Cir. 2000) (*en banc*) (finding no final agency action where the plaintiffs "sought 'wholesale improvement' of the Forest Service's 'program' of timber management in the Texas forests, objecting to Forest Service practices throughout the four National Forests in Texas and covering harvesting from the 1970s to timber sales which have not yet occurred" (citation omitted)). By characterizing Plaintiffs' challenge as an impermissible programmatic attack, "Defendants confuse aggregation of similar, discrete purported injuries—claims that many people were injured in similar ways by the same type of agency action—for a broad programmatic attack." *Ramirez*, 310 F. Supp. 3d at 21.

DOL relies heavily on two district court cases from more than a decade ago that held challenges to be impermissibly programmatic.[4] In *Arden Wood, Inc. v. U.S. Citizenship &*

[4] *Viola v. FDIC*, Civ. Action No. 18-2351 (JEB), 2019 WL 2492786 (D.D.C. June 14, 2019), cited by DOL, has no relevance here. In the quoted passage, the court dismissed a *pro se* plaintiff's claim that agencies violated the Mandatory Victim Restitution Act by failing to provide him with certain information on the grounds that the Act did not require the agencies to take any such action. 2019 WL 2492786 at *5. In contrast, there is no dispute that both the Offered Wage Rate provision and 8 U.S.C. § 1188(a)(1) impose affirmative obligations on DOL.

Immigration Services, 480 F. Supp. 2d 141, 150 & n.9 (D.D.C. 2007), the court relied on the plaintiffs' own characterization of their claims challenging a variety of unidentified "interpretations, policies and practices" as a "broad policy attack." And in *RCM Technologies, Inc. v. U.S. Department of Homeland Security*, 614 F. Supp. 2d 39, 44–45 (D.D.C. 2009), the court concluded that a policy or practice can *never* be challenged as final agency action so long as a plaintiff can *also* challenge application of that decision. To the extent these cases stand for that latter proposition, they incorrectly read the D.C. Circuit's decision in *Venetian Casino*, and are inconsistent with the more recent decisions from this and other courts allowing such challenges cited above, including the D.C. Circuit's decision in *Meina Xie*. There, the D.C. Circuit reversed the district court's dismissal of a challenge to an unwritten State Department policy and practice of delaying review of visa applications filed by certain categories of immigrants, contrary to statute. 780 F.3d at 405. The district court had found the plaintiff's challenge was not sufficiently discrete, relying on the same line of authority on which DOL relies here. *Id.* at 407–08. The court of appeals, however, found that the plaintiff's claim, which sought compliance with a precise statutory provision and alleged a specific violation of that provision, was not impermissibly programmatic. *Id.* at 408.

The action challenged here is no less discrete: Plaintiffs have identified a specific regulatory provision—one part of the Offered Wage Rate provision—and alleged a specific way that Defendants are acting contrary to that provision. If DOL published a formal announcement that it was refusing to consider the prevailing wage in reviewing applications for foreign labor certifications absent the completion of a survey by a SWA, a challenge to that specific formal policy would clearly be "discrete," whether or not plaintiffs also challenged specific applications of the policy. The fact that DOL has adopted that policy without putting it in writing does not make

the challenge any less discrete. "A contrary rule 'would allow an agency to shield its decisions from judicial review simply by refusing to put those decisions in writing.'" *R.I.L-R.* 80 F. Supp. 3d at 184 (quoting *Grand Canyon Tr. v. Pub. Serv. Co. of N.M.*, 283 F. Supp. 2d 1249, 1252 (D.N.M. 2003)).

III. Plaintiffs' Claims are Timely.

DOL contends that Plaintiffs' claims allege a "facial challenge" to the 2010 Rule and, therefore, are time barred. *See* Dkt. 34-1 at 37–38 (Defs. Mem. at 28–29). This argument is meritless. As explained in the complaint, Plaintiffs' memorandum in support of summary judgment, and above, Plaintiffs challenge a policy and practice that, among other things, violates the 2010 Rule and unlawfully amends the 2010 Rule. As the D.C. Circuit held in *Hispanic Affairs Project*, a claim challenging an agency's violation of a regulation is distinct from a claim challenging the regulation itself and does not accrue when the regulation is promulgated. 901 F.3d at 387 (reversing a dismissal on statute of limitations grounds); *see also Zhang v. U.S. Citizenship & Immigration Servs.*, 344 F. Supp. 3d 32, 57 (D.D.C. 2018) (challenge to "interpretation of [a] regulation as erroneous and violative of the APA" does not accrue at time of regulation's publication). Logically, an agency cannot violate a rule until after the rule is in effect; a claim based on a policy and practice of such violations cannot accrue until even later. The same goes for an unlawful amendment of a rule.

To obtain dismissal on statute of limitations grounds, DOL bears a "heavy burden" to show "there is no dispute as to 'when the limitations period began.'" *FDIC v. Bank of Am., N.A.*, 308 F. Supp. 3d 197, 205 (D.D.C. 2018) (quoting *Feld Entm't, Inc. v. Am. Soc'y for the Prevention of Cruelty to Animals*, 873 F. Supp. 2d 288, 308 (D.D.C. 2012)). Here, DOL has produced no evidence that would allow the Court to conclude that Plaintiffs' claim that DOL was acting in

contravention to the 2010 rule accrued more than six years prior to their commencement of this action in August 2018. Thus, dismissal on statute of limitations grounds would be improper.

IV. DOL's Practice of Ignoring the Prevailing Wage Rate Absent Third-Party Action is Contrary to its Regulations, and Arbitrary and Capricious.

Under 20 C.F.R. § 655.120, DOL cannot grant a labor certification unless it finds that an employer is offering the highest of four specified wage rates, one of which is the prevailing wage rate. This provision obliges DOL to examine the prevailing wage for each job. While there of course could be some scenario where it is *impossible* to do so, the presence of an OES prevailing wage, which DOL has repeatedly stated is a measure of the prevailing wage rate, for all of the jobs at issue makes clear that is not the operative scenario.

DOL maintains that its policy and practice of refusing to determine whether an offered wage meets or exceeds the prevailing wage unless a state agency conducts a survey that complies with a 1981 guidance document is consistent with § 655.120. To make this argument, DOL asks the Court to defer to an "interpretation" that it has advanced for the first time publicly in this litigation and is not reflected in any authoritative agency document: that the term "prevailing hourly wage rate or piece rate" in 20 C.F.R. § 655.120 means a "wage determined by SWAs based on surveys, consistent with 1981 guidance, that states have discretion whether to conduct at all." DOL's interpretation of the plain language is unreasonable.

A. The plain meaning of the regulation requires DOL to consider whether an offered wage meets or exceeds the prevailing wage.

As explained in Plaintiffs' opening memorandum, nothing in the text of the regulation creates an ambiguity as to whether DOL may choose to adopt a dual system under which the prevailing wage is only considered in less than half the country. *See* Dkt. 31 at 30–33 (Pls. Mem. at 21–24). Rather, the text requires DOL to determine whether an offered wage rate meets or

exceeds the prevailing wage everywhere. DOL's plea for deference thus falls flat. Deference to an agency's interpretation of a regulation is appropriate only where the regulation is ambiguous. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (stating that a rule is unambiguous if, after relying on both the text and other interpretive tools, a court concludes that "there is only one reasonable construction of a regulation").

DOL's argument, unsupported by any evidence, that "[t]he states are in a far better position than DOL" to conduct prevailing wage surveys, Dkt. 34-1 at 42 (Defs. Mem. at 33), does not change the plain meaning of the regulation. This argument also does not appear in the administrative record and thus cannot be used in litigation to justify the agency's action. *See SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). In fact, far from relying on the states, the 2010 Rule *removed all references to State-based wage surveys* that appeared in the earlier rule. For example, the 2010 Rule removed the definition of the term "prevailing hourly wage," which had referred to "State-based wage surveys," and added a definition of "prevailing wage" that cross-referenced then-existing 20 C.F.R. § 653.501(d)(4), which made no reference to state-based wage surveys. *See* 2010 Rule, 75 Fed. Reg. at 6980 (current 20 C.F.R. § 655.103); *see* 20 C.F.R. § 653.501(d)(4) (2008) (providing that offered wages shall not be "less than the prevailing wages and working conditions among similarly employed agricultural workers in the area of intended employment"). The 2010 Rule also eliminated 20 C.F.R. § 655.107(b), which under the 2008 Rule had referenced "State agency prevailing wage survey determination[s]." These changes are neither "slight" nor "semantic," as DOL claims. They are presumed to have real effect in light of well-established interpretive canons. *See*, *e.g.*, *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 106–07 (1941).

DOL's argument that it has never taken steps to ascertain the prevailing wage for each job offer, Dkt. 34-1 at 44 (Defs. Mem. at 35), likewise does not alter the regulation's plain meaning.

To begin with, because the relevant regulations did not go into effect until March 2010, and DOL has not produced information reflecting when DOL decided to interpret *these* regulations, it is hardly clear that the interpretation is "longstanding." *See*, *e.g.*, *Return Mail, Inc. v. U.S. Postal Serv.*, 139 S. Ct. 1853, 1865 (2019) (agency practice in interpreting statute enacted eight years ago is not "longstanding"); *Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 707 F.2d 548, 561 n.9 (D.C. Cir. 1983) (five-year-old rule is not a "longstanding" interpretation). In any event, deference to an "'interpretation of longstanding duration'… must still yield to the plain meaning" of the regulation. *Port Auth. of N.Y. & N.J. v. Dep't of Transp.*, 479 F.3d 21, 32 n.4 (D.C. Cir. 2007) (quoting *Barnhart v. Walton*, 535 U.S. 212, 220 (2002)); *see Kisor*, 139 S. Ct. at 2416 (stating that even a longstanding interpretation "must fall 'within the bounds of reasonable interpretation.'" (citation omitted)).

B. DOL's interpretation is not reasonable and does not warrant deference.

To the extent that DOL is arguing that the 2010 Rule *unambiguously* requires the interpretation it puts forth in this litigation, it is wrong. The Rule "do[es] not directly or clearly address the issue" of what sources DOL must look to determine the prevailing wage. *Kisor*, 139 S. Ct. at 2410. It thus cannot unambiguously limit DOL to a specific source.

To the extent that DOL is arguing that its position is a reasonable construction of an ambiguous regulation, "[t]he text, structure, history, and so forth" of the 2010 Rule demonstrate that DOL's interpretation is unreasonable. *Id.* at 2416. Starting with the text, *see*, *e.g.*, *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 204 (2011), the 2010 Rule makes no reference to SWA surveys. Moreover, the *deletion* of the references to "State-based wage surveys" and SWAs is strong evidence that reading a SWA survey requirement into the regulation is unreasonable.

DOL relies on materials and past practice that predate the 2010 Rule and are thus of little

value here.[5] Besides their age, these materials do little to indicate the meaning of the Offered Wage Rate provision. For example, DOL points to the long period that ETA Handbook 385 has been in place, *see* Dkt. 34-1 at 42 (Defs. Mem. at 33), but ignores the fact that ETA Handbook 385, on its face, was not developed for the H-2A Program; rather, it was developed for use by the Public Employment Service in administering a separate statutory program. *See* AR1.[6] Nothing in the administrative record reflects any reasoned decisionmaking as to why the Handbook should be used to provide the exclusive method of determining H-2A prevailing wages under the 2010 Rule. The fact that DOL used Handbook 385 to calculate prevailing wages under the Wagner-Peyser Act in 1981 is no more indicative of the meaning of the 2010 Rule than the fact that DOL uses OES wages to calculate the prevailing wage for H-2B work today. To the extent that DOL has sometimes used the term "prevailing wage" to refer to rates resulting from SWA-conducted, Handbook-compliant surveys in the H-2A context, this point carries little weight, as DOL has *also*, in the past and currently, used the term "prevailing wage" to refer to wages derived from other sources of data. *See, e.g.*, 2008 Rule, 73 Fed. Reg. at 77167, 77211. Plaintiffs do not dispute that DOL could use SWA surveys as *a* source of the prevailing wage; they dispute that they are the

[5] DOL's only citations to the 2010 Rule are to a remark in the preamble that "Some states do not perform prevailing wage surveys" and a reference to "the highest of the applicable wages." Dkt. 34-1 at 44 (Defs. Mem. at 35) (quoting 75 Fed. Reg. at 6947, 6901). DOL also includes a citation to current 20 C.F.R. § 655.122(*l*)(1) without identifying what in that provision supports their argument.

Moreover, DOL points to no document reflecting "the agency's 'authoritative' or 'official position'" that the 2010 Rule limits consideration of the prevailing wage to SWA-conducted, Handbook-compliant surveys. *See Kisor*, 139 S. Ct. at 2416. The undated internal training PowerPoint presentation included in the administrative record, AR60–76, is not such a document. And neither of the two memos to SWAs opine on what happens if a SWA does not conduct a survey, or reflect any consideration of how that would impact workers. *See* AR27–59; AR77–104.

[6] The H-2A program did not even exist until the H-2 visa program was divided into H-2A and H-2B subgroups by the Immigration Reform and Control Act of 1986. *See* Pub. L. No. 99-603, 100 Stat. 3359, 3411.

sole source.

The strongest evidence of the unreasonableness of DOL's interpretation is the consequences of that interpretation. Under DOL's interpretation, prevailing wages are not considered by DOL at all in *twenty-nine* states and territories. *See* Dkt. 31 at 17 (Pls. Mem. at 8). An interpretation of the prevailing wage rate that allows states, in their sole discretion, to determine whether or not workers receive the benefit of the prevailing wage rate is not a reasonable reading of the 2010 Rule. DOL suggests that its reading bolsters the goal of "cooperative federalism," but nothing in the Rule or DOL's explanations of the purpose of the prevailing wage provision suggest that such a policy justifies eliminating the prevailing wage requirement for the vast majority of H-2A jobs. *See also Cal. Pub. Utils. Comm'n v. FERC*, 879 F.3d 966, 974 (9th Cir. 2018) (refusing to defer to an agency's interpretation where doing so would render a rule functionally meaningless); *Stainback v. Mabus*, 671 F. Supp. 2d 126, 133–34 (D.D.C. 2009) (same).

C. DOL's practice is arbitrary and capricious.

For the reasons discussed above, to interpret the 2010 Rule to allow DOL to rely on "one form of wage data," Dkt. 34-1 at 47 (Defs. Mem. at 38), that does not exist at all in the majority of the country, and thus deprive U.S. workers in the majority of the country of an important wage protection, is arbitrary and capricious. DOL makes a passing request for *Skidmore* deference, but its interpretation does not qualify even for that lower degree of deference. DOL offers no evidence of "thoroughness… in its consideration" of the outcome of the practice. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). DOL has not indicated that it has considered the consequences in adopting its interpretation, and thus "lacks the power to persuade under *Skidmore*." *Fogo de Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127, 1141 (D.C. Cir. 2014). In short,

DOL "fails the requirement of reasoned decisionmaking under arbitrary and capricious review." *Id.*

V. DOL's Policy and Practice is Contrary to the INA Under DOL's Own Interpretation of the Statute.

The challenged policy and practice is contrary to the INA under DOL's own interpretation of the statute, which states that allowing employers to pay the AEWR where the prevailing wage is higher "disadvantage[s]" domestic workers. 2010 Rule, 75 Fed. Reg. at 6893. Plaintiffs have provided evidence that DOL is allowing employers to do just that and, indeed, is not even attempting to meet its mandate of ascertaining whether the wages employers are providing in the H-2A program "adversely affect the wages and working conditions of workers in the United States" in the majority of cases. 8 U.S.C. § 1188(a)(1)(B). Such a practice violates 8 U.S.C. § 1188(a)(1)(B).

DOL's looks to *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 387 (1984), but *Chevron* cannot assist it here. The challenged action stems from an informal agency interpretation, not one promulgated in the exercise of the agency's rulemaking authority, and lacks evidence of thorough consideration. *See United States v. Mead Corp.*, 533 U.S. 218, 235 (2001). Rather, the "interpretation appears to have been made without any degree of deliberation, thoughtful consideration or comments from the public." *N.Y. State Bar Ass'n v. FTC*, 276 F. Supp. 2d 110, 139 (D.D.C. 2003). In addition, DOL previously concluded that the INA prohibits it from allowing H-2A employers to pay the AEWR when the prevailing wage is higher. 2010 Rule, 75 Fed. Reg. at 6893. In light of the "unexplained inconsistency" between that conclusion and the challenged action, DOL is entitled to no deference. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (internal marks omitted) (quoting *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet*

Servs., 545 U.S. 967, 981 (2005)). Because its policy and practice is contrary to the INA, it is unlawful.

VI. No Exception to Notice-and-Comment Requirements Applies to the Challenged Action.

If DOL wanted to amend the Offered Wage Rate provision to eliminate the requirement that H-2A employers pay the prevailing wage absent a SWA-conducted survey, it was required to do so through notice-and-comment rulemaking—as it is currently attempting to do. *See* 2019 NPRM, 84 Fed. Reg. at 36179. Because it failed to do so, the challenged policy and practice is unlawful and should be set aside. *See* 5 U.S.C. § 706(2)(D).

DOL argues that it was free to adopt a new rule without undertaking notice-and-comment rulemaking because the change is not "legislative" in character, but instead constitutes a procedural rule. DOL's argument runs contrary to D.C. Circuit case law. In *Mendoza*, the D.C. Circuit held that guidance letters that both established the procedures for herder employers seeking H-2A certification and established wages and working conditions were legislative rules. 754 F.3d at 1023–24. The court explained that, although "stated at a high enough level of generality, the [letters] seem procedural—they set forth the agency's enforcement plan for determining employer compliance with the requirements of the INA and describe how employers seeking H–2A certification should present themselves to the agency"—the practical impact of the letters demonstrated that they were legislative rules. *Id.* at 1024 (citation and internal marks omitted). The court explained that the letters "do not merely describe how the Department will evaluate H–2A applications, but they set the bar for what employers must do to obtain approval. In doing so, they substantially affect the rights and interests of both herders and employers." *Id.*[7]

[7] Contrary to DOL's suggestion, *see* Dkt. 34-1 at 40 (Defs. Mem. at 31), *Mendoza* was not overruled by *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015). In *Perez*, the Supreme

Here, the challenged policy and practice, and the *de facto* rule DOL has created by adopting it, does the same. It does not merely set forth "the process of how often SWAs submit the results of their prevailing wage surveys to DOL." Dkt. 34-1 at 41 (Defs. Mem. at 32). Rather, it sets out a substantive rule that, absent a SWA survey, H-2A employers need not pay a wage that meets or exceeds the prevailing wage. It thus "alter[s] the standards imposed on ... employers seeking H-2A certification." *Mendoza*, 754 F.3d at 1024. DOL argues that the policy and practice has no "present binding effect," and is thus not legislative, because its effect is "contingent on SWAs choosing whether and when to conduct wage surveys." Dkt. 34-1 at 41 (Defs. Mem. at 32). Yet making the prevailing wage requirement "contingent on SWAs choosing whether and when to conduct wage surveys," to quote DOL, is itself a substantive change to the 2010 Rule. That change allows DOL to "ignore th[e] regulation's general rule," and creates an exception. *Mendoza*, 754 F.3d at 1023. Under that exception, although SWAs may choose whether to conduct wage surveys, DOL lacks discretion to use other data sources to calculate the prevailing wage when they do not. By putting U.S. workers' entitlement to the prevailing wage at the discretion of states, the *de facto* rule has a present binding effect.

DOL has *de facto* amended the Offered Wage Rate provision of the 2010 Rule to include a limitation on when the prevailing wage will be considered in granting foreign labor certifications. "It is well-settled that a policy that adds a requirement not found in the relevant regulation is a substantive rule that is invalid unless promulgated after notice and comment." *Zhang*, 344 F. Supp.

Court overruled D.C. Circuit precedent holding that agencies must use notice-and-comment rulemaking when they seek to issue a new *interpretative* rule "that deviates significantly from one the agency has previously adopted." *Id*. at 1203. That point was not at issue in *Mendoza*, which continues to be cited for its analysis of legislative versus other forms of rules. *See*, *e.g.*, *Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1115, 1116 (D.C. Cir. 2019); *Children's Hosp. of the King's Daughters, Inc. v. Azar*, 896 F.3d 615, 620 (4th Cir. 2018); *Jafarzadeh v. Nielsen*, 321 F. Supp. 3d 19, 46 (D.D.C. 2018).

at 58. Because DOL's policy and practice effects a substantive change to the 2010 Rule and was adopted without notice-and-comment, it should be set aside.

CONCLUSION

For the foregoing reasons and those stated in Plaintiffs' opening memorandum, the Court should grant Plaintiffs' motion for summary judgment, deny Defendants' cross-motion for summary judgment and motion for judgment on the pleadings, declare DOL's policy and practice unlawful, and enjoin DOL from granting foreign labor certifications without determining whether the offered wage meets or exceeds the prevailing wage.

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Respectfully submitted,

/s/ Adam R. Pulver

Adam R. Pulver (D.C. Bar No. 1020475)
Michael T. Kirkpatrick (D.C. Bar No. 486293)
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
apulver@citizen.org

Counsel for All Plaintiffs

Mark Heller (Ohio Bar No. 27027)
Emily Brown (Ohio Bar No. 92553)
ADVOCATES FOR BASIC LEGAL EQUALITY, INC.
525 Jefferson Avenue, Ste. 300
Toledo, OH 43604
(419) 255-0814

Counsel for Plaintiffs Gomez, Avila, Princilus, and FLOC

Gregory S. Schell (Fla. Bar No. 287199)
SOUTHERN MIGRANT LEGAL SERVICES
A Project of Texas RioGrande Legal Aid, Inc.
9851 Daphne Avenue
Palm Beach Gardens, FL 33410-4734
(561) 627-2108

Dave Mauch (Tex. Bar No. 24086837)
TEXAS RIOGRANDE LEGAL AID, INC.
6502 Nursery Drive, Suite 302
Victoria, TX 77904
(361) 237-1681

Douglas L. Stevick (Tex. Bar No. 00797498)
TEXAS RIOGRANDE LEGAL AID, INC.
5439 Lindenwood Avenue
Saint Louis, MO 63109
(314) 449-5161

Elizabeth T. Leiserson (Tenn. Bar No. 036095)
SOUTHERN MIGRANT LEGAL SERVICES
A Project of Texas RioGrande Legal Aid, Inc.
311 Plus Park Blvd., Ste. 135
Nashville, TN 37217
(615) 538-0725

Counsel for Plaintiff Garcia